

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

SAUL CANIZALES,

Plaintiff,

vs.

No. CIV 07-198 JB/RHS

SERGEANT TODD ARMENDARIZ,
OFFICER ANGELO LOVATO, OFFICER
TOMOYOSHI STEWARD, OFFICER
SHAWN WILLOUGHBY, SERGEANT MARK
GARCIA, OFFICER MATTHEW SCHMIDT,
OFFICER MIKE BROADBECK,
SERGEANT JAMES COLLINS individually
and in their official capacities as police officers for the
ALBUQUERQUE POLICE DEPARTMENT,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Plaintiff's Motion for an Order to Show Cause Why Complete Records from Defendants' Personnel Files and Internal Affairs Investigation Files have not been Produced, filed December 2, 2007 (Doc. 53). The primary issue is whether the Court should enter a show cause order against the Defendants for their failure to produce personnel files and internal investigation reports in response to the Court's order requiring their production. Because the Defendants have not produced the documents or responded to this motion, the Court will order the Defendants to show cause why they should not be held in contempt for failure to obey the Court's order.

PROCEDURAL BACKGROUND

The Court's order of November 16, 2007 directs the Defendants, pursuant to rule 37(a) of the Federal Rules of Civil Procedure, to produce to Canizales the contents of the Defendants'

Personnel Files and Internal Affairs investigation files fully and completely, and that said disclosure would be under protection pursuant to the Court's Order. See Stipulated Protective Order, filed November 16, 2007 (Doc. 52). To date, the Defendants' counsel has not responded. Trial in this matter is set for March 10, 2008. See Scheduling Order at 2, filed September 17, 2007 (Doc. 19).

Canizales requests the Court issue an Order to Show Cause why the Defendants have not violated the Court's November 19, 2007 Order granting the Plaintiff's Unopposed Motion for Protective Order, filed November 6, 2007 (Doc. 40). The Defendants did not file a written response in opposition to the motion. On January 14, 2008, Canizales filed the Plaintiff's Notice of Completion of Briefing on Plaintiff's Motion for an Order to Show Cause Why Complete Records from Defendants' Personnel Files and Internal Affairs Investigation Files Have not been Produced, in which he notified the Court that briefing is complete on his motion to show cause. See Plaintiff's Notice of Completion of Briefing on Plaintiff's Motion for an Order to Show Cause Why Complete Records from Defendants' Personnel Files and Internal Affairs Investigation Files Have Not Been Produced, filed January 14, 2008 (Doc. 54).

RULE 37

Rule 37 of the Federal Rules of Civil Procedure provides sanctions when a party fails to make disclosures or to cooperate in discovery. Rule 37(b)(2) provides: "[If a party or a party's officer, director, or managing agent -- or a witness designated under Rule 30(b)(6) or 31(a)(4)--f ails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: . . . treating as contempt of court the failure to obey any order except an order" Such an order may also include reasonable expenses, including attorney fees, that the failure may cause. See Fed. R. Civ. P. 37(b)(2)(C)("Instead of or in addition to the orders above, the court must order the

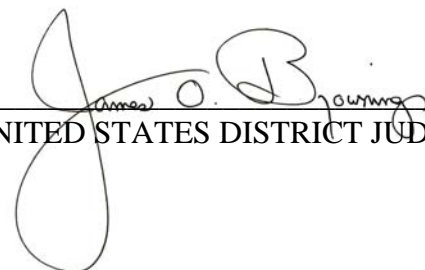
disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.").

ANALYSIS

"A response must be served and filed within fourteen (14) calendar days after service of the motion." D.N.M.LR-Civ. 7.6(a). "The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion." D.N.M.LR-Civ. 7.1(b). Because the Defendants did not file a written opposition to the motion, the Court could consider the motion unopposed and grant it. The Court has, however, also reviewed the motion on the merits.

The Defendants have failed to produce the materials that Canizales has requested, under rule 34, and that the Court subsequently ordered the Defendants to produce. Given the trial date, Canizales' counsel cannot continue to wait for a response, because the delay may cause him to suffer prejudice. The Court will enter the requested show cause order.

IT IS ORDERED that the Defendants shall show cause, at a hearing set for January 30, 2008 at 1:30 p.m., why the Court should not hold them and/or their counsel in contempt for having violated its Order compelling the production of the Defendants' Personnel Files and Internal Affairs investigation file. The Defendants will also pay the Plaintiff his reasonable costs and attorney's fees incurred in preparing his motion.


UNITED STATES DISTRICT JUDGE

Counsel:

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Albuquerque, New Mexico

Attorneys for the Plaintiff

Kathryn Levy
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Albuquerque, New Mexico

Attorneys for the Defendants